THE UTILITY REFORM NETWORK
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Mr. Fred Harris
Legal Division
California Public Utilities Commission
505 Van Ness Ave., Room 5040
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Sent by e-mail to: fnh@cpuc.ca.gov, jva@cpuc.ca.gov,
and public records@cpuc.ca.gov

Re: TURN's Comments on Third Draft Resolution L-436 (December 20, 2012 Draft)

Dear Mr. Harris,

The Utility Reform Network ("TURN") submits these comments on the December 20, 2012 draft of Resolution L-436, *Resolution Regarding the Development of New Regulations Regarding Public Access to Records of the California Public Utilities Commission and Requests for Confidential Treatment of Records* ("Draft Resolution"). This is the third draft of Resolution L-436. On July 27, 2012, TURN submitted comments on the previous draft.

1. Introduction: TURN Supports Many of the Goals and Initiatives of the Draft Resolution

TURN continues to support a key goal of this effort – to bring the CPUC into conformity with the California Public Records Act ("CPRA") by releasing records held by the CPUC unless it has been demonstrated that the records are subject to a CPRA exemption from disclosure or other provision of law barring disclosure. As each of the three Draft Resolutions has recognized, all too often under the current General Order ("GO") 66-C, regulated entities have automatically designated the material they submit as confidential without demonstrating that such treatment is warranted, effectively placing the burden on the public to obtain an order from the Commission authorizing disclosure of records. Although the status quo is highly convenient for the entities the Commission regulates, the Draft Resolution appropriately resolves to put an end to this practice, which turns the CPRA on its head.

TURN further supports other initiatives in the Draft Resolution, including: prompt release of records from CPUC safety investigations and audits; a comprehensive online index of records held by the CPUC and how they may be located; an online database showing utility requests for confidentiality and the CPUC's responses to those requests; and an online safety portal to allow access to safety-related records received or generated by the CPUC. The San Bruno gas pipeline explosion and subsequent scrutiny of safety regulation and performance underscore the importance of promoting access to Commission safety-related records. And the promised indexes and databases will provide much-needed transparency regarding records that the Commission receives from regulated entities. Currently, contrary to the intent of the CPRA, even close observers of the CPUC, like TURN, are unaware of many (perhaps most) of the records and reports that regulated entities have provided to the Commission.

Although supportive of many of the goals and initiatives of this undertaking, TURN writes these comments to re-emphasize an important concern that was given insufficient attention in the latest Draft Resolution, and to express a more general concern about the timeline for this project.

2. The Draft Resolution Fails to Address TURN's Important Concern that, Absent Clarification, Approval of Unopposed Confidentiality Requests Outside of Formal Proceedings Could Preclude Litigants and ALJs in Formal Proceedings from Reviewing a Utility's Claims of Confidentiality

As the Commission well knows, TURN is a regular and frequent participant in CPUC energy, telecommunications and water proceedings. In those proceedings, many of the documents that utilities provide in discovery are designated confidential. In TURN's experience, utilities are often overly aggressive in asserting confidentiality. A particularly common event is that a utility will designate an entire multi-page document as confidential when only a few words or sentences need to be redacted. The way that disputes regarding utility confidentiality designations are addressed now is through the authority of administrative law judges ("ALJ") to rule on such claims. The ALJs and the parties generally handle these confidentiality disputes efficiently, with the ALJs' rulings not infrequently narrowing or overturning the utility's confidentiality designation.[1] In fact, with the encouragement of the ALJ, who justifiably wants to avoid closing a hearing room to the public and creating a sealed hearing transcript, a utility will often agree that certain parts of a document can be entered into, and discussed on, the public record. Allowing ALJs to rule on utility confidentiality designations is one aspect of the current system that works well and should be retained.

Yet, as TURN pointed out in its July 27, 2012 comments, the Draft Resolution creates a potential threat to this well-functioning process. The issue is whether a Commission order approving a utility's confidentiality request for a particular document outside of a formal proceeding will foreclose an ALJ from re-considering in a formal proceeding whether that document, or any part thereof, is entitled to confidentiality. TURN is particularly concerned that

[1] That said, most utility confidentiality designations are not challenged.

it and other parties will not be able to devote time and resources to reviewing each and every claim of confidentiality that utilities assert in the new confidentiality review processes being created in the Draft Resolution and that, in the face of other pressing priorities, the Commission may view such "unopposed" requests as non-controversial and approve them in Commission resolutions with minimal consideration and less than complete information. Should the document later become important to a formal proceeding or an advice letter process (an eventuality that parties will have little ability to predict when a utility initially requests an exemption from public disclosure), the Commission's prior determination should not preclude parties from challenging, and ALJs or industry Divisions from considering, whether the utility's confidentiality designation should be sustained in the context of a litigated matter.

There is a simple way to address TURN's concern. New GO 66-D should make clear that any Commission resolution or decision addressing a utility's confidentiality request does not limit a party's ability to challenge, and the ALJs' and the industry Divisions' authority to review, the utility's confidentiality claim in a formal proceeding or advice letter process. Such language should become boilerplate in the Public and Confidential Status Resolutions and any other similar Commission resolutions contemplated by the Draft Resolution.

As TURN pointed out in its July 27, 2012 comments, absent such a clarification, TURN and other litigants would be placed in the position of needing to make protective challenges to confidentiality requests, assuming (as is highly unlikely) they have the time and resources to monitor all of the many likely requests by the numerous utilities the Commission regulates. It would be a poor use of party and Commission resources to have to submit and decide such protective challenges.

It may be that Section 3.1.1 of draft GO 66-D is intended to affirm that Commission resolutions addressing confidentiality assertions for purposes of public records requests would have no bearing on the current confidentiality review processes for formal proceedings and advice letters. If so, this needs to be made clearer.

Unfortunately, the latest Draft Resolution, which devotes painstaking and lengthy discussions to utility objections, notes TURN's concern (if at all) only in passing, in a discussion that appears to misunderstand TURN's issue. On page 96, the Draft Resolution states that parties such as TURN would still be able to "appeal to the full Commission" for access to records that was not initially denied or within a class of records designated as confidential. However, TURN's issue is not gaining access to confidential documents; TURN generally has no problem obtaining such access under non-disclosure agreements. TURN's concern is overbroad utility confidentiality designations that would be immune from challenge in the hearing room (or advice letter process). Such immunity would prevent the parties and the ALJs from ensuring that the public has the broadest possible access to the record on which the Commission bases its decisions. Requiring parties to resort to an "appeal to the full Commission" would destroy the flexibility that ALJs and the parties now constructively employ in order to meet this critical goal.

Accordingly, TURN respectfully requests that GO 66-D be modified to make clear that Commission findings of confidentiality for purpose of responding to public records requests do not limit the right of parties to challenge the confidentiality of records in CPUC formal proceedings or advice letters.

3. The Commission and Legal Division Should Adopt a Timeline that Recognizes the Importance of Reforming the Commission's Public Records Processes As Soon As Possible

As noted at the beginning of these comments, TURN supports many of the goals and initiatives of this effort and believes that conforming the Commission's practices to the requirements of the CPRA and the California Constitution is long overdue. Thus, it is cause for concern that the latest Draft Resolution appears to be slowing down the reform process.

Whereas the prior draft would have adopted a new GO 66-D, the adoption of this Draft Resolution would postpone any new GO 66-D until some unspecified future date, after "further refinement in workshops and comments." (p. 134). TURN recognizes that refinements are necessary and supports further discussion of appropriately narrowed issues in a workshop, but TURN is concerned that the Draft Resolution now proposes four new workshops. Given that only one workshop cycle (workshop, comments and revised draft) was concluded in nine months of 2012, many additional workshops could prolong the reform process by years. Such delay may well serve the interests of regulated entities who benefit from the presumption of confidentiality their submissions enjoy under the current system, but delay does not serve the public interest.[2]

Accordingly, TURN encourages the Commission and Legal Division to establish a timeline to complete this process this year and further to identify opportunities to implement some of the initiatives, such as the safety portal and indexes of records, sooner than that.

Sincerely,

/s/

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[2] TURN is concerned that this effort is in danger in bogging down by meticulously addressing each and every utility objection, many of which are close variants of objections previously raised and addressed. The recent Draft Resolution has swelled in length from 79 pages to 179 pages; most of the new pages are consumed with lengthy responses to issues raised by utilities. At some point soon, the Commission has to recognize that the utilities have had a full opportunity to present their concerns and that it is time to finish the job.